Nos. 12070-1

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12070.

MYRON L. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

No. 12071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

REPLY BRIEF OF APPELLEE.

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STATUTES

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Statement of the Pleadings.

We shall refer to the record in the Glenn case by the letter "R," to that in the Drake case by the letters "D. R."

Upon the application of the appellants, the court dispensed with the printing of the depositions but ordered that they be considered as a part of the record [R. 391]. For the convenience of the court, we have collated in the appendix portions of the depositions to which we shall refer or cite. We shall refer to the appendix by the letters "Ap.," followed by the number of the page where the document or matter referred to is printed. For brevity, in citing portions of a deposition to sustain any statement of fact, we shall do so by reference to the portions of the appendix where the part of the deposition cited is found. Where a deposition is directly referred to or

quoted from, we shall cite the number of the page and line of the particular portion of the deposition, also the appendix page where the portion cited or quoted is printed. In quoting from depositions, we will omit, without asterisks, the objections and discussions between counsel.

We shall refer to appellants' brief by the letter "B."

While the record does not disclose the date when the Glenn action was originally commenced, we agree with appellants' statement (B. 2) that it was filed on March 19, 1945. The second amended complaint was filed on June 23, 1945 [R. 7]. The answer is set out R. 17-36. On July 10, 1946, Raymond E. Drake and a number of others filed a separate suit [D. R. 2-6]. The only difference between the complaints in the two cases is that all of the plaintiffs in the Drake case were substation operators, whereas the plaintiffs in the Glenn case embrace other classes of employees as well as substation operators. Hence, we shall hereafter refer only to the pleadings in the Glenn case.

After the effective date of the Portal-to-Portal Act of 1947, hereinafter referred to as the "Portal Act," the court granted the motion of defendant in each case to dismiss for want of jurisdiction of the subject matter of the action, with leave to file an amended complaint [R. 99-100; D. R. 34-36], and the plaintiffs in both cases filed amended complaints (that in the Glenn case, being the third amended complaint, is hereafter referred to as "complaint"). It was alleged that the plaintiffs were employed under an express oral and written agreement that they were to be paid a stipulated monthly salary based on forty hours of work each week, and were to receive in addition thereto time and a half for hours worked in excess of forty per week; that each of the plaintiffs worked in

excess of forty hours per week without receiving such compensation [R. 107-8]. The second cause of action alleged that the overtime sued for was compensable under custom and practice [R. 111].

As stated by appellants, the answer to the complaint [R. 131-172] denied the material allegations of the complaint. Paragraph III of the answer set out in detail the duties and contracts of employment with the various classes of plaintiff employees [R. 137-149]. Succinctly, the answer alleged, in substance, that the employment of the various employees other than primary servicemen required them to live upon the defendant's premises for five days a week, and during those five days to remain close enough to the station or residence to be able to hear the alarm bell and respond to an emergency occurring during what is designated in the answer as the nighttime hours.* It was specifically alleged that there was no contract, custom or practice to pay appellants for the overtime for which they seek compensation [R. 154-5]. By the term "on call" or "standby" time as used throughout this brief, we shall be deemed to refer to the sixteen hours of time for which the appellants seek recovery in this action, and which generally can be said to be represented by the time between the last required call to the switching center in the afternoon or evening and the first required call in the morning, appellants claiming that between the first call in the morning and the last call in the afternoon they were on a definite eight-hour shift, the excess over eight hours representing their lunch hour.

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*The headgate tenders were not required to live upon the defendant's premises, but were required to live within 15 to 20 minutes' walking time of their head works five days a week, and when not engaged in active duties to remain close enough to their residence to respond to an emergency call [R. 241].

Statement of the Questions Involved and the Manner in Which They Were Raised.

Prior to the filing of defendant's answer to the third amended complaint, plaintiffs filed a motion for partial summary judgment [R. 112]. Defendant countered with a motion for summary judgment as to all plaintiffs [R. 219-220]. The court reached the conclusion that there was no genuine issue as to any material fact; that the activities for which each plaintiff sought overtime compensation were engaged in prior to the effective date of the Portal Act, and had not been made compensable by contract, custom or practice "during the portion of the day when such activities were engaged in," and that the defendant would be entitled to summary judgment except that the facts which would warrant summary judgment divested the court of jurisdiction of the subject-matter of the action [R. 330]. Its judgment of dismissal was based solely upon that ground [R. 333].

If it is held that the court was without such jurisdiction, the judgment of dismissal must be affirmed. If this Court should hold that the record discloses jurisdiction, it must then consider the question whether the affirmative defenses of good faith have been established as a matter of law.

We shall present each question under a separate heading.

All italics throughout this brief and the appendix will be ours unless otherwise noted.

Statement or Abstract of Facts.

The record before this Court and upon which the District Court based its conclusion that it was without jurisdiction of the subject matter of these suits, shows the following facts:

Primary Service Men.

The primary servicemen were employed for a definite eight-hour shift for five days a week. The defendant contends that at the end of the shift they were at liberty to go where they pleased, except that during certain nights of the week they were required, if they did not return home or, returning to their homes subsequently left them, to leave a telephone number where they could be reached in the event their services were needed in an emergency [R. 46, 53, 96-97, 137-8, 224-227]. Two of the four primary servicemen whose depositions have been taken admitted that such was the situation [Ap. 21-22, 24, 28]. The two others contend, however, that they were required during certain days of the week to remain at their homes for the purpose of receiving telephone calls in the event of an emergency [R. 138, 228, 307, 319]. At Santa Paula the primary servicemen's names were listed in the telephone directory [R. 138, 228, 308, 319].

All primary servicemen were paid a monthly salary, which was the only compensation which they received unless they were called out between shifts for an emergency, in which event they were paid time and a half [R. 46, 138-139, 227-228, 295-296, 309, 320; Ap. 16-17, 19, 20-21, 23-25, 28, 31]. All primary servicemen made out their own time cards and never showed on those time cards any overtime except when actually called upon for emergency work between shifts. [R. 46, 97, 151-152, 224,

229; Ap. 17, 23, 28-29, 31-32]. No payments were ever asked for or made to them for leaving their telephone numbers, or for being required to stay in their residences even if it be assumed that such requirement was so imposed upon any of them [R. 138-139, 224-225, 228-229, 295-296, 309-310, 319-320, 321; Ap. 16-17, 19, 23, 25, 29, 31-32, 33].

Substation Operators and Attendants.

Substation operators lived in a company house near their substation and for five days a week were required to remain in such proximity to their residence or station that they could hear an alarm bell in case their services were needed for an emergency [R. 50-51, 113-114, 140, 178-180, 195-196, 200-201, 304-305, 323; D. R. 95; Ap. 44, 60, 69].

There was a specified hour for making the first and last calls and certain other calls to the switching center, which varied at the different stations. The time for the first call usually was from 7:30 or 8:00 A. M. and the time for the last call 4:30 or 5:00 P. M. [R. 50, 140, 182; Ap. 39, 47, 51, 63]. Defendant contends that except for such calls and street light switching at some stations, there was no definite time at which they were required to perform any active services, but both parties contemplated their being performed during the daytime [R. 50, 97, 140, 182, 205; Ap. 40, 44, 59, 72]. Appellants contend that they had a definite eight-hour shift during which they were expected to be at or near their substations [R. 305, 322-323; Ap. 43, 44, 48, 59, 63, 73, 77]. Their families lived with them and when they were not performing any active duties they could employ their time in any way they saw fit, provided they did not go so far from the station

or their residence as not to be within hearing of the alarm [R. 140, 178, 196, 200-201; Ap. 38, 45, 51-52, 62-63, 73, 75]. They were paid a monthly salary and no other compensation, unless they performed some active service during what was designated in the answer and will be hereinafter referred to as "nighttime hours," which subsequent to December 24, 1943, was between 6:00 P. M. and 8:00 A. M., and prior to that between 10:00 P. M. and 8:00 A. M. Active duties performed in the nighttime hours have been designated in the answer and will be referred to herein as "emergency services." For any such emergency services they received time and a half [R. 50, 119, 141, 180, 181, 183-184, 201-202, 204, 305, 318, 321-323; Ap. 34, 36, 42, 45-46, 49-50, 59, 66, 69, 74, 78, 79]. They each made out their own time cards and notwithstanding the fact that they did not always take eight hours to perform their active services, they always showed eight hours of work, neither more nor less, and never showed overtime except for emergency services performed during said nighttime hours, for which they were paid time and a half for all time so reported [R. 44, 182-183, 204-206, 304-305, 322; D. R. 125, 127-128, 137-138, 140; Ap. 36-37, 41-42, 51, 54, 63-64, 67, 70-71, 74, 79].*

Each and all of the foregoing facts are equally applicable to relief operators, except that as they relieved the regular operators at various stations for two days a week, they traveled from station to station and therefore did not have their families, if any, with them [R. 95, 120, 142, 176, 200-201, 322].

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*A photostatic copy of each of the time sheets, attached to Ellingford's deposition as examples, is reproduced for the convenience of the Court on pages 55, 56 and 57 of the Appendix.

Hydro Station Attendants and Apprentice Attendants.

Although their specific duties were somewhat different [R. 48-49, 233, 312-313], the nature of employment of the hydro station operators and apprentice operators was in all respects similar to that of the substation operators [R. 48-9, 144-6, 231-240, 312-3, 315]. Normally their first call in the morning would be made not later than 8:00 and the last scheduled call not later than 4:30 or 5:00 in the afternoon [R. 234-5].

Each employee made out his own time report and always reported eight hours, regardless of whether he performed that amount of active service or not [R. 45, 146-147, 222, 235-236, 239, 311; Ap. 86-87, 95]. He was paid a monthly salary, and while his method of reporting overtime was somewhat different from that employed by the substation operators, the substance and effect of it was that any emergency services performed during nighttime hours, which as to hydro employees were between 4:30 P. M. and 7:30 A. M., were reported as overtime, for which he was paid time and a half [R. 45-6, 146-8, 222-4, 235-8, 239-240, 311-3, Ap. 83, 85, 92-94, 95-96].

Starting May 1, 1943, for those employed at Kern Hydro Station No. 1 such overtime was paid for any services reported in excess of eight hours per day, even though the weekly report did not show more than forty hours per week. Such practice was extended from station to station until applicable to all of them on or about October 1, 1945 [R. 147, 237].

Headgate Tenders.

Each and all of the facts stated with reference to the employment of the hydro station attendants is equally applicable to the headgate tenders [R. 45, 46, 50, 51, 143, 144, 241, 244, 323, 324; Ap. 102, 103, 104-6, 108-9, 112-114].

Computation of Overtime Rate.

In determining the amount of overtime payable to any resident employee for emergency services performed during the nighttime hours, the defendant, with the knowledge of all of the employees, computed the hourly rate on the basis that the monthly salary was paid for forty hours of work per week [R. 107, 108, 119; Ap. 50, 53-54, 70-71, 76-78, 87].

The only dispute shown is as to the time which the resident employees consumed in performing their active duties, the defendant claiming that it was always much less than eight hours per day or forty hours per week, and in the case of the substation operators it usually did not take more than two to five hours per day [R. 180, 182, 187, 189, 233-4, 241, 139-40, 143-4, 145]. Appellants, on the other hand, claim that they had a definite eight hour shift during which they were required to be on or near their various stations, even though they were not actively engaged during the whole of such time, and that they were on call during the other sixteen hours of the day [R. 303, 305, 322-323; Ap. 43, 44, 48, 59, 63, 73, 77, 81, 82, 89-90, 104, 112-113]. They further contend that their monthly salary was paid to them for their eight hour shift, and that the only overtime they received was for emergency services performed during the nighttime hours; hence, they were entitled to recover for their waiting or standby time [R. 107, 108, 119, 305; Ap. 36, 45-46, 50, 66, 78-79, 93-94, 95-96, 104-105, 114].

Summary of Argument.

I.

The record not only fails to disclose that there was any express provision of a contract, custom or practice to pay appellants for their "on call" or "standby" time for which they seek recovery, but on the contrary, it affirmatively appears without contradiction that the contract, custom and practice was precisely to the contrary; that none of the appellants were ever paid anything for so-called standby time, and that none of them reported it because they knew it was the custom and practice of the defendant not to pay for it. Hence, under Section 2 of the Portal Act, the Court was without jurisdiction of the subject-matter of the actions, and its dismissals of the actions were proper.

II.

In the event that it should be held that the court below had jurisdiction of the suit, it would have been necessary for the District Court to have rendered summary judgment in favor of defendant upon the ground that its affirmative defenses of good faith were established by the record as a matter of law.

While appellants have presented their argument under eight different headings, the two points above outlined constitute a complete answer to every contention advanced by them.

ARGUMENT.

I.

The District Court Correctly Held It Was Without Jurisdiction of the Subject-Matter of the Actions and Properly Dismissed the Cases Upon That Ground.

Appellants' position is at least paradoxical. Citing *Kennedy v. Silas Mason Co.,* 334 U. S. 249, and *Twigg v. Yale etc. Co.,* 7 F. R. D. 488 (B. 22), their principal contention seems to be that a summary judgment should not be granted where the factual situation is complex and controversial. We concede that it should not be granted where the record is controversial as to any material fact. However, in the instant case, unlike the situation in the cases cited by plaintiff, there is no dispute on any issue of fact material to the question of the court's jurisdiction.

However, while arguing that, because of the dispute they claim exists as to the facts and the complicated issues of law, the cases should be remanded for a trial upon the merits, appellants apparently feel that the record is sufficiently clear both as to the fact and law so that on remanding the case for a retrial this Court should be able to and should decide the result of that trial.

As stated by the appellants, it is to be "noted that the District Court did not grant summary judgment, *but dismissed the actions on its own motions*" [B. 20; R. 333; D. R. 105]. It is, of course, axiomatic that Federal Courts, being of limited jurisdiction, can not proceed unless the record at all times discloses their jurisdiction

of the subject-matter, and that when its lack of jurisdiction affirmatively appears, it is the duty of the court to dismiss the case whether or not the point has been raised by either party.*

At the outset it may be noted that the complaint (third amended in the *Glenn* case and second amended in the *Drake* case) did not state facts sufficient to show jurisdiction, the allegations simply being that the plaintiffs were employed to perform forty hours of service per week at a monthly salary "based on forty hours of work each week," and were to receive time and a half for all hours worked in excess of forty hours per week [R. 107-8]. The insufficiency of the complaint lies in the fact that the Portal Act required an *express* provision of a contract making the particular activities sued for compensable, or else that they be made so by custom and practice. An agreement of the character alleged does not specify what activities it was agreed should be paid for or were by custom and practice made compensable. In the appendix, pages 129-137, we have digested the numerous decisions that have considered allegations or proof of the same character as in the complaint and held them insufficient. The court below, however, based its decision that it was without jurisdiction upon the entire record. Hence, we shall address ourselves to the record, contenting ourselves as to the insufficiency of the complaint with calling the court's attention to it, and the supporting cases to be found in the appendix. However, by not again referring to the insufficiency of the pleading we do not wish to be understood as waiving that defect.

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*See *post*, pp. 52 to 57, and Appendix, pp. 124 to 125, where cases on this point are collated.

As we read appellants' brief, they contend that the judgment of dismissal should be reversed for three reasons:

(1) That the plaintiffs had a right of recovery under the Fair Labor Standards Act (hereinafter referred to as the act or the original act) and that such right was unaffected by the Portal Act.

(2) That there was an express contract to pay them for such standby time.

(3) That there was a custom and practice to pay them for such standby time.

We shall reply separately to each contention combining however under one subheading our reply to contentions two and three.

(1) Plaintiffs' Contention That the Right of Recovery Which They Claim They Had Under the Original Act Is Unaffected by the Portal Act Is Wholly Without Merit.

The main part of the plaintiffs' argument is that under the Act prior to its amendment the plaintiffs were entitled to recover. This we do not concede. If the evidence sustained the denials and averments of the answers, judgments would have had to be for defendant. But the question presented by this appeal is not whether plaintiffs could or could not have prevailed under the original act, *but whether in view of the Portal Act the District Court had jurisdiction of the subject-matter of the actions.*

As shown by our preceding statement, there are four classes of employees involved: (1) primary servicemen; (2) substation operators; (3) hydro station operators, and (4) head gate tenders. The last three classes of em-

ployees may be designated generally as "resident employees," and as the employment of all three presents the same questions as to the court's jurisdiction, they can be considered together.

The employment of the primary servicemen was entirely different and may be summarily disposed of.

Primary Servicemen.

As noted, the primary servicemen were employed on a definite eight hour shift. It is clear that merely being required to leave their telephone numbers where they could be reached, even before the amendment to the Act, was not an employment restraint entitling them to overtime. [See Ap. pp. 138 to 141, where the cases sustaining this rule are collated]

Plaintiffs claim (and although the defendant disputes it we concede that for the purposes of this appeal the plaintiffs' claim must be accepted as correct) that certain of the primary servicemen were required on certain days of the week to remain at their homes to receive telephone calls but were only paid overtime for actual services performed in answer to an emergency call between shifts. If it were to be conceded that summary judgment could not have been granted before the Portal Act as to these primary servicemen on the theory that if their claims were sustained by the evidence that their detention at their homes constituted on call time under the decisions in *Armour & Company v. Wantock, et al.,* 323 U. S. 126, and *Skidmore v. Swift & Company, supra,* 323 U. S. 134 (hereinafter referred to as *"Armour"* and *"Skidmore"* cases). It was the clear intent of the Portal Act to prevent a recovery for any activities, including on call time of the character herein discussed, unless such services were

made compensable by an express provision of a contract or by a custom or practice.

The contention of the appellants that the Portal Act was aimed only at the *Mount Clemens* case and was not intended to bar recovery for the standby time of all of the various classes of employees involved in this litigation is entirely untenable.

Both the congressional debates and the wording of the Act show a clear intent upon the part of Congress to prohibit recovery of overtime for *any* activity which was not made compensable by express provision of a contract, or by custom or practice.

Senator Barkley in opposing the bill, in a debate on March 21st, 1947, said in part:

> "'It is necessary to go from the section which undertakes to define portal-to-portal back to section 2 to find out what the authors are talking about; and when we get back to section 2 we find that portal-to-portal *means anything which is not covered by contract or by custom or practice.*' (Congressional Record, Vol. 93, pages 2428, 2429.)"

See Ap. pp. 1 to 14 where the Congressional discussions on this subject are collated.

Part I, Section 1, of the bill declares:

> "The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, *thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation,* upon employers with the results that, if said Act as so interpreted or claims arising under such in-

terpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) *employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay;"*

Portal-to-Portal Act of 1947, Part I, Sec. 1.

That a recovery by appellants in this case would constitute windfall payments, both immense in amount and retroactive in operation can not be denied. The original suit was not filed until after the *Armour* and *Skidmore* decisions, evidencing that prior to those decisions none of the defendant's employees had the slightest thought of claiming additional compensation.

It appears from the depositions of the appellant primary servicemen that their monthly salaries were between $220.00 and $225.00 [Ap. 16, 25, 28, 31], in addition to which they had been paid time and a half for any emergency services between shifts, their hourly rate computed on their salary being paid for their eight hour shift. None of them had ever reported as overtime any time spent between shifts, either while they were

waiting or being available at their own homes or elsewhere, to answer telephone calls. Their present theory is that while their salary of $225.00 per month was adequate compensation for the services performed during their eight hour shift, that in addition to that salary, for merely being available between shifts to answer a telephone call, they are entitled to additional compensation, as overtime for 16 hours, or three times the amount of their salary or $675.00 per month, or a total monthly compensation of $900.00 per month, one-fourth of which was paid for services requiring physical exertion and skill, and three-fourths for merely being available in case their services were required for an emergency. That such payments would not only be fantastic and unjust but windfall compensation, as that term was understood by Congress, can not be gainsaid.

Section 2 of the Act, dealing with existing claims, reads:

> "(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account *of any activity* of an employee engaged in prior to the date of the enactment of this Act, *except* an activity which was compensable by either—
>
> "(1) an *express provision* of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice *only when it was engaged in during the portion of the day with respect to which it was so made compensable.*

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, *shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act,* to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment *with respect to an activity which was not compensable under subsections (a) and (b) of this section.*"

Portal-to-Portal Act of 1947, Part II, Sec. 2, p. 3.

Broader and more comprehensive language could not have been employed by Congress. Clearly the Act was not passed to deal merely with Portal-to-Portal activities, but with any activity which had not been made compensable by contract, custom or practice in the particular plant.*

The record is clear and undisputed that the primary servicemen were not paid anything, and understood they were not to be paid anything, for either being required to leave their telephone numbers where they could be reached, or for being required to remain in their homes to take telephone calls, if they were so required.**

It is to be noted that the appellants do not discuss the primary service men at all, but only the resident employees.

Resident Employees.

It must be conceded that prior to the Portal Act the District Court had jurisdiction of the subject-matter of the action. But, notwithstanding that it was held by the Supreme Court in the *Skidmore* and *Armour* cases that the employee firemen in those cases were entitled to eight hours of standby time, we have always felt that the factual situations in the *Skidmore* and *Armour* cases and *Johnson v. Dierks Lumber & Coal Co.* (C. C. A. 8), 130 F. 2d 115, 120, cited by plaintiffs (B. 25) were so dissimilar from those of the instant cases as to have no controlling effect on appellants' right of recovery even under the original act.

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*See Appendix, pages 126 to 128, where cases on this point are collated.

**See *post*, pages 44 to 45, where the testimony of the primary servicemen on this point is set out.

Notwithstanding the claims of the resident employee appellants that they had a definite eight hour shift, we believe we could have convinced any reasonable court or jury that the time in which it took them to perform their active duties between their first and last calls to the switching centers was much less than eight hours per day. Indeed, an examination of the summary of the logs of the sub-station men which were introduced at the pre-trial hearing on November 18, 1946 [Deft. Exs. B-1 to S-6] show that on the basis of time estimated by Mr. Lyons in his testimony [D. R. 117, 127], which is uncontroverted, the time required for their active duties about the sub-station would average between 1½ and 2 hours per day [Ap. pp. 115 to 120]. It is true that in addition to that they were required to take care of their yards and station grounds, but it may be doubted whether that time should be computed under the Act. Even if it should, it only consumed a short time each day.

While in the depositions the appellants complain of the strain of answering call-outs, the exhibits, U to CJ, introduced at the said pre-trial hearing show all recorded call-outs of the resident employee appellants and that as to each such appellant there were a number of months in which there were no call-outs at all, and that the call-outs of all resident appellants averaged one in 15.5538 days.

While there has never been any dispute that when not engaged in active duties they were required to remain in hearing of the alarm for five days a week, there is no question but that when not occupied in some duty in the station they were free to be in their own homes with their families and to engage in any personal activity which they saw fit which did not take them beyond the hearing of the alarm bell. Indeed, Ellingford's deposition shows that he solicited the job so as to be able during the day-

time to care for his sick wife [Ap. 52-53]. In short, before the Portal Act, we were always confident that on a trial on the merits we could show a factual situation from which a court or jury could reasonably conclude that when not employed in active duty, the appellants were not engaged to wait, *but were waiting to be engaged.* If the court and jury had reached this conclusion we think there is no question but that judgment should have been for defendant. In the *Skidmore* case it is said:

> "Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court."
>
> * * * * * * * *
>
> "The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations. *In some occupations, it says, periods of inactivity are not properly counted as working time even though the employee is subject to call.*"
>
> * * * * * * * *
>
> "In general, the answer depends 'upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work.' "
>
> *Skidmore v. Swift & Co.,* 323 U. S. 134, 136, 138.

For similar decisions announcing that in the situation of the instant case where it is difficult to ascertain the actual amount of time which an employee gives to his

service, any reasonable agreement between the employer and employee will be followed and sustained by the court, see Ap. pp. 143 to 146.

We have briefly sketched the basis for our defense under the Act before its amendment in reply to the arguments of appellants that they were clearly entitled to recover under the Act. However, as we have repeatedly pointed out, the question presented to the court by these appeals is not whether either party could have prevailed under the original act, *but whether after the effective date of the Portal Act the District Court had jurisdiction of the subject-matter of these actions.*

Further, even if we were to assume that the terms of employment of appellants contravened the Act, it cannot be denied that the express purpose of the Portal Act was to validate employment arrangements that were invalid under the judicial interpretation which had been accorded to the original Act and to relieve employers from liability in situations similar to that of the instant case.

As stated by the Fourth Circuit Court of Appeals:

> "Looked at in another way, all that Congress has done by the legislation here under consideration is to validate the contracts and agreements between employer and employee *which were invalid under the Fair Labor Standards Act by reason of the interpretation placed by the Supreme Court upon that act;* and the authority of the legislative body to validate voluntary transactions which at the time they were entered into were by statute invalid or illegal has been repeatedly upheld. (Citing cases.) In other words, the contracts of employment which contemplated that no payment should be made for the portal to portal activities but that these were to be compen-

> sated by the agreed wage, were invalid only because of the provisions of the Fair Labor Standards Act. *There was nothing in law or in reason which forbade Congress to give validity to these contracts retroactively, just as the invalid pledge of securities by National Bankruptcy Associations was validated by retroactive legislation in the case of McNair v. Knott, supra."*
>
> *Seese v. Bethlehem Steel Co.,* 168 F. 2d 58, 64.*

The Fourth Circuit Court of Appeals in *Atallah v. B. H. Hubbert & Sons, Inc.,* 168 F. 2d 939, cited and followed the above case, and certiorari was denied under the name of *Cingrigrani v. B. H. Hubbert & Sons, Inc.,* 335 U. S. 868.

The reasoning upon which the Supreme Court based its decision in *Tennessee C. I. & R. Co. v. Muscoda Local 123,* 321 U. S. 590, logically led step by step through the *Armour* and *Skidmore* decisions and *Jewell Ridge Coal Corporation v. Local 6167,* 325 U. S. 160, to what the appellants state to be the "most sensational result in *Anderson v. Mt. Clemens Pottery Co.,* 328 U. S. 680, 90 L. Ed. 1515 (1946)."**

As we have shown, it is crystal clear, both from the congressional debates and from the language of the Act, that it was the intent of Congress by the Portal Act to wipe out the right of recovery for any services or activities which had not customarily been paid for by the employer or for which he had not contracted to pay. The contention which appellants here advance that the Portal Act was

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*See Appendix, page 142, where similar cases are collated.

**Herein referred to as the *"Mt. Clemens case"* or "decision."

limited to portal activities has been rejected, so far as we have been advised, by every court to which it has been presented.

See Appendix, pages 126 to 128, where the decisions are collated and Appendix, pages 1 to 14, where the excerpts from the congressional debates on the subject are collated.

Appellants cite and greatly rely on *Conwell v. Central Missouri Telephone Co.* (D. C. Mo.), 76 Fed. Supp. 398, and the affirmance of the decision of the District Court in *Central Missouri Telephone Co. v. Conwell* (C. C. A. 8), 170 F. 2d 641, quoting at some length from the latter decision. Any careful reading of either decision will show that the factual situation was substantially dissimilar from that in the instant cases.

The suit was by switchboard operators who were required to be on active duty at the defendant's switchboard for eleven hours a day and were paid for only eight. The switchboard was in the defendant's telephone building and the operators were not permitted to leave the room in which it was located during the eleven hours of service. However, a cot was placed in the room. The plaintiffs were paid only for eight hours, three of the eleven hours on duty being deducted as theoretical sleeping time. When plaintiffs demanded an increase of wages, the defendant simply shortened the theoretical sleeping time. The District Court rendered judgment for the plaintiffs. The Court of Appeals affirmed. Both decisions were predicated upon the theory that the plaintiffs in that case were not performing standby time but were directly engaged for eleven steady hours of active employment. In other words, as we read the decisions, neither the District nor the Appellate Court assumed that there

had been any actual sleeping time. As a matter of fact, the opinions of both courts indicate that the placing of the cots in the room was merely for the purpose of avoiding payment for more than eight hours of the continuous eleven hours the plaintiffs were required to be in constant attendance upon the switchboard. The Appellate Court said, in part:

> "We conclude that plaintiffs were on duty, performing compensable activities, during the entire eleven hours they spent at defendant's exchanges during the period involved in this action."
>
> *Central Missouri Tel. Co. v. Conwell* (C. C. A. 8), 170 F. 2d 641, 646.

The District Court thus specifically distinguished the factual situation of that case from the instant cases:

> ". . . If an operator is employed in her home, she may, when not engaged in operating the switchboard, go about the duties of her home, looking after the wants and needs of her family. That she certainly cannot do if she is away from her home, conducting the affairs of her employer in its own business office where she is subject to continuous call to duty wherever the patrons of her employer demand service.
>
> * * * * * * * *
>
> ". . . Defendant has cited cases in which the courts have held that certain types of employees who were *standing by* waiting to be called to perform some duty were not in compensatory service. *In all of those cases, however, such persons were compensated for such service as they actually rendered to the employer over and above their regular duty; that is, when a fireman who may have slept upon the*

premises ready for call was actually called out, he was compensated for that time." (Italics in first instance the court's.)

Conwell v. Central Missouri Telephone Co. (D. C. Mo.), 76 Fed. Supp. 398, 405, 406.

Clearly, the instant cases fall within the distinction above pointed out. Here, each resident employee when not engaged in any active duty could be with his family in his home and indulge in any personal pursuit he desired which did not carry him beyond hearing of the alarm bell.

It seems to us clear that under the *Conwell* case and the theory upon which the decisions were rendered, it must be held that in the instant cases the standby time of the appellants was rendered non-compensable by the Portal Act.

The decision by the Court of Appeals in the *Conwell* case is cited on page 28 of appellants' brief to sustain the proposition that the Portal Act was meant to apply only to portal activities. It does not by any stretch of the imagination announce any such holding. It equally fails to sustain the further proposition for which it is cited (B. 38) that the standby time in the instant cases was compensable under custom or contract.

We think there is no need of commenting on the other cases cited by appellants. None of them are as factually close as the *Conwell* case, and all of them are subject to the same, and even greater distinctions.

That the Act was intended to cover precisely the instant cases is made clear by the debate in the House on the report of the Conference Bill which both Houses adopted:

"Mr. Hinshaw. The gentleman remembers the cases known as the stand-by cases which were brought out before his committee in which certain employees might be called upon at some time not during their regular working time to perform some duty and that many suits for wages have been instituted under that type of claim. Is that provided for in the present bill?

"Mr. Walter. Yes; we feel that under the language of section 2(b) of this bill that type of arrangement is covered and that the employer is not liable.

"Mr. Hinshaw. *The case I had in mind was one where there were certain persons who were left to guard electrical distribution stations where they were given a house and so forth and perhaps performed one or two labors per day and yet were paid on a monthly basis. Large suits were brought for time and a half for an additional 8 hours per day pursuant to the ruling of the court.*

"Mr. Walter. We hope that we have met that situation and all of the situations that have been brought to our attention, because we had in mind that all of these portal-to-portal suits are in the nature of windfalls. *None of the plaintiffs—and I say that advisedly—ever felt they were entitled to compensation for activities which are the basis of these suits.*" 93 Cong. Rec. 4515 (May 1, 1947).

The judgments of dismissal must then be affirmed unless there is some evidence in the record to sustain the contentions of the appellants' standby time was made compensable by the *express provisions* of a contract or by practice or custom.

(2) The Record Does Not Show That the Standby Time of the Appellants Was Made Compensable by the Express Provisions of a Contract, or by Custom or Practice. On the Contrary, It Appears Without Controversy That the Agreement, Custom and Practice Were the Direct Opposite.

According to the answers of plaintiffs to defendant's interrogatories, the contract on which they rely consisted of Operating Order A-36* (partially set out by appellants, B. 10-11), the hiring of the men, and custom, practice, and representations [see Interrogatory 16, R. 262; Answer, R. 320; Interrogatories 43-46, R. 269; Answers, R. 322; Interrogatories 82-85, R. 276; Answers, R. 312-314; Interrogatories 111-115, R. 281-2; Answers, R. 324].

It is to be noted that the appellants claim their contract was partly oral and partly written, and that the only written portion is the bulletin, A-36.

The bulletin for 1942 was introduced as Plaintiffs' Exhibit 1, and as revised in 1943 as Plaintiffs' Exhibit 2 [R. 171].

A-36 1942 provided:

> "(2) *Station attendants* have no regular scheduled working hours and are subject to call twenty-four hours per day on each day worked. *Forty hours shall constitute a work-week.*

*Hereafter sometimes referred to as "bulletin."

* * * * * * * *

"7. *Overtime.*

A. The payment of overtime shall be on the basis of one and one-half times the average annual hourly rate of pay for overtime work. The average annual hourly rate shall be calculated by multiplying the employee's monthly rate of pay by 12 and dividing by the quantity of 52 x 40. Fractions of less than one-half cent should be disregarded and fractions of one-half cent and over raised to the next full cent before multiplying by one and one-half."

The revision of January 1, 1943, partially referred to by appellants (B. 10-11), contained these same provisions, except that station attendants were included in the category of "week period employees."

So far as we are advised, it has been held by every court which has passed upon the question that a general statement such as contained in Bulletin A-36 or a provision to the same effect in a contract of employment that the employee will be paid a specific hourly rate or an agreed weekly or monthly salary and time and a half work in excess of forty hours a week does not meet the requirements of the Portal Act, in that such promise or contract provision does not specify the activities that are compensable; and that under the Portal Act there must be an express promise to pay *for the particular activities for which compensation is sought* or else a custom or practice to pay for those particular activities. [See cases digested Ap. pp. 129 to 137.]

Appellants assert (B. 31-3) that this Court had before it in *Joshua Hendy Corp. v. Mills*, 169 F. 2d 898, a contract substantially similar to that alleged here as being set out in Bulletin A-36. This is entirely erroneous. An ex-

amination of that case will show that waiting or standby time was not involved; that the contract in that case was a definite written one between the union and the appellants, and was in no wise similar to the bulletin.

Lewellen v. Hardy-Burlingham Min. Co. (D. C. Ky.), 73 Fed. Supp. 63, from which appellants quote, is even farther afield. According to the opinion, there was no standby time at all involved, the Court finding that the plaintiff had performed services in excess of forty hours per week for which he had not been paid. There is no suggestion in the opinion that the services were rendered non-compensable by the Portal Act. Indeed, that Act apparently was not relied on as a defense and was not referred to in the opinion.

Appellants argue that the bulletin constituted a direct promise to pay overtime for all time spent upon defendant's premises in excess of forty hours per week. It is clear that no such interpretation can be reasonably drawn from the language of the bulletin. As we have pointed out, before the *Armour* and *Skidmore* cases, standby time had not been regarded by management or labor as compensable, as such, and Congress so found in its study prior to the passage of the Portal Act. We again call attention to the debate on the Conference Report between Mr. Hinshaw and Mr. Walters heretofore set out wherein Mr. Hinshaw asked Mr. Walters if recovery in the precise situation presented by the instant cases had been barred by the Act and Mr. Walters replied:

> "We hope we have met that situation and all situations that have been brought to our attention. * * * None of the plaintiffs—and I say that ad-

> visedly—ever felt they were entitled to compensation for activities which are the basis of these suits." (93 Cong. Rec. 4515 (May 1, 1947).)

Indeed, Interpretative Bulletin 13 issued by the Administrator [R. 158-160] which, as we read appellants' brief, they concede the defendant had a right to rely on before the *Armour* and *Skidmore* cases, in effect stated that as to situations such as presented by the instant cases, the on-call or waiting time was not compensable.

Hence, we say that neither the 1942 nor the 1943 revision of Bulletin A-36, both of which were issued long before the *Armour* and *Skidmore* decisions, could be reasonably interpreted as even suggesting, much less promising, compensation for standby time.

Most appropriate are the observations of the District Court of Minnesota in *Plummer v. Minn. etc. Co.*, 76 Fed. Supp. 745, where the plaintiffs claimed that their preliminary and postliminary activities were made compensable by a direct contract of employment wherein they were told they would be paid so many cents per hour for all work performed. In granting summary judgment for the defendant, the court, in part, said:

> ". . . Clearly, such a showing, in view of the type of activities alleged to have been performed, would not sustain recovery under the Act. *It is conceded that the parties did not agree in the employment contract that the services enumerated were to be compensable* . . . The claimed basis for their recovery herein as indicated by this showing is the very situation which apparently motivated Congress in passing the legislation now commonly referred to as the Portal-to-Portal Act. *It seems elementary that*

the conditions of that Act are not met by the implied contract claimed to be based on the general employment contract which is set forth in plaintiffs' affidavit."

Plummer v. Minn. etc. Co. (Minn.), 76 Fed. Supp. 745, 746.

There is another legal principle which, independent of other considerations, would prevent such construction. It is well settled that when there are two possible constructions of a written instrument, one of which will lead to fair and equitable results and the other to absurd and inequitable results, the former will be accepted.*

We have already shown the absurd result the contention of appellants would lead to so far as the primary servicemen are concerned. The appellants' interpretation of the bulletin as to the resident employees is only slightly less fantastic and absurd, and that because of the fact that being less skilled, they receive less monthly compensation.

The salaries paid to the various resident employees as shown on Exhibits B-1 to S-6, inclusive, ranged from $135.00 to $200.00 per month. We believe that as to substation operators, the average would be somewhere between $175.00 and $180.00 per month, and between $5.00 and $10.00 less per month for the hydro operators. Mr. Ellingford, a substation operator, testified his salary was $180.00 per month [Ap. 53]. Using his rate of compensation as an example, the construction which appellants place upon the contract would mean that the defendant agreed to pay Ellingford for the services which he

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*See Ap. pages 147 to 149, where cases in support of this fundamental rule are collated.

performed $180.00 per month and, for doing nothing other than remaining on the premises for sixteen hours a day in order to respond to an emergency call, an additional compensation of three times that amount, or $540.00. However, so far as we are advised, no court has allowed overtime for eating and sleeping even in the case of such a drastic employment restriction as was involved in the *Armour* and *Skidmore* cases. If, therefore, we give the Bulletin A-36 the interpretation appellants contend for but limit it to eight hours of standby time, it would constitute an agreement between Ellingford and the defendant to pay him $180.00 for his actual services, and $270.00 per month for not doing anything other than remaining within call so as to be able to respond to an emergency. In other words, for the services which required any effort or skill on Ellingford's part, he was to receive $180.00 per month, and for doing nothing other than remaining on the premises where he could be with his family and engage in any gainful or other pursuit he desired, he was to be paid $270.00 per month. The absolute absurdity of such an agreement is apparent without further argument; no management that expected to remain solvent would have made it.

It is, of course, elementary that in interpreting a contract, the conduct of the parties may be considered. In this case, however, there is no need of relying on that rule, since the appellants claim that the contract itself was not wholly written but consisted of the bulletin, the employment, and *custom and practice*. When the conduct of the parties is considered, it is crystal clear that neither party interpreted the bulletin as containing any promise or agreement to pay overtime other than for emergency services performed during the nighttime hours. All of the

resident employees reported eight hours of work regardless of whether they performed that number of hours of active work or not, and reported as overtime only emergency services performed by them during the nighttime hours, for which it is conceded they were paid time and a half. Significant also is the conceded fact that when the War Manpower Commission placed Southern California on a forty-eight hour per week basis, all of the resident employees,—and for that matter all of the primary servicemen,—reported as overtime and were paid for eight hours on the sixth day, and made no further claim for overtime for that day unless they performed some emergency service during the nighttime hours.

It is further uncontroverted that in figuring their overtime, their hourly rate was determined upon the basis that their salary was applicable to forty hours of service per week. The record not only is destitute of a suggestion that the plaintiffs were not cognizant of the method of calculating their overtime pay or that they objected to it, but the contrary affirmatively appears [See Affidavits of Plaintiffs, R. 121].

The testimony of the appellants whose depositions were taken is so significant on this subject that we desire to call it to the attention of the Court:

Eugene L. Ellingford, a substation operator, testified:

> "Q. You received a monthly salary? A. I received a monthly salary *that was computed on an hourly basis for eight hours a day.*
>
> Q. Did somebody instruct you as to that computation? A. I don't get what you mean.
>
> Q. Well, as I understand it, at the time you were hired you were informed of a monthly salary of so

many dollars a month? A. *It was stated to me that it was paid on an hourly basis for eight hours a day."* [Ellingford Dep., pp. 13-14, lines 26-9; Ap. 50.]

Vernon B. Wert, a substation operator, in his deposition testified'

"A. Each one makes out their own daily time sheets.

* * * * * * * *

At the conclusion of five days you would have had in 40 hours. We are now working six days a week, so that means that the sixth day in the week would be an overtime day, and it is so recorded.

Q. In these time reports that you each make out, what is your practice with reference to showing the time or the hours worked? Which is it you show, the hours worked or the time during which you worked? A. *We don't show the times that we worked.*

Q. I mean by the clock, the time shown by the clock? Do you show the time, so to speak, when you go on duty and when you go off duty, or just so many hours worked? A. We put down the date and what we were doing. * * *

Q. *Eight hours?* A. *Yes.*

Q. You put that down regardless of whether you worked more or less than that time, do you? A. Oh, no. *If we work more than eight hours, why, then, we put in for overtime for that.* That goes in a different section of the time sheet.

Q. On the same form? A. On the same form.

Q. *What if you work less than eight hours; what do you do then?* A. *We put in eight hours."* [Wert Dep., pp. 8-10, lines 26-9; Ap. 70-71.]

"Q. In computing the overtime that you were paid —you were paid some overtime; is that correct? A. Yes.

Q. In computing that, was that based upon an 8-hour day, five days a week when you were working five days a week? A. *Based on a 40-hour week, yes.*

Q. *It was based on a 40-hour week?* A. *Yes.*" [Wert Dep., p. 41, lines 19-26; Ap. 77-78.]

M. E. Roach, a hydro station attendant, in his deposition testified:

"Q. I know; but your actual active work—let's leave aside standby time—was until noon, and then later it was changed? A. Yes.

Q. *In that time, no matter what it was, you just put eight hours in there?* A. *Yes.*" [Roach Dep., p. 26, lines 20-26; Ap. 87.]

"Q. What did they pay overtime for? A. For the time that you were called out.

Q. After normal hours? A. After 4:30 in the evening, or before 7:30 in the morning." [Roach Dep., p. 12, lines 11-15; Ap. 83.]

Rogers, hydro-station attendant—

"Q. When you came to take it, what, if anything, was said about it that you remember; the substance of what he said about the job? A. Well, he told me that I would work a regular eight-hour day, but I would be stuck there 24 hours a day.

Q. What did he say, if anything, about overtime? A. *We would get overtime if I was called out after 4:30.*" [Rogers' Dep., p. 25, lines 8-15; Ap. 93.]

See, also, for similar testimony of other appellants whose depositions were taken, Appendix pp. 36, 42, 53-54, 66, 76-77, 94, 96.

As noted, appellants state that part of their oral contract consisted of the actual hiring and custom and practice. The affidavits of Mr. Short and Mr. Garrison, who did the hiring, are in the record [191-203]. Each states that he impressed upon each applicant that he had to remain within hearing distance of the bell for twenty-four hours a day [R. 195, 200, 201]; that he would receive a designated salary and time and a half for emergency services during the so-called nighttime hours [R. 196, 197, 201]. This is not contradicted, but is conceded in the affidavits filed by the substation operators, from which we quote:

> "The undersigned plaintiffs being first duly sworn, depose and say: that the only agreement entered into by the substation employees and the defendant, Southern California Edison Company, was that said employees would be hired on a salary basis, were required to remain on the premises twenty-four hours per day, and were to receive time and a half for all hours worked in excess of forty hours in each work week." [R. 303.]

> "After eight hours the substation operators considered themselves free from routine duties but understood that they were still, for the balance of the 24-hour work day, in the employ of the defendant company." [R. 304.]

> "Plaintiffs were paid a monthly salary and were required to be on the premises twenty-four hours a day. They were instructed to put down only eight

> hours per day on their time cards. Overtime for special emergency work was paid after eight hours per day." [R. 305.]

In the fourth paragraph of the third amended complaint appellants allege:

> ". . . plaintiffs were employed at a *stipulated monthly salary based on 40 hours of work each week* and were to receive in addition thereto, additional compensation at one and one-half times their regular rate for all hours worked in excess of forty hours in each work week." [R. 107-8.]

The only dispute between the parties is as to whether the resident employees, as they claim, actually had a definite eight hour shift in which they were expected to be on duty at their station, or whether, as the defendant claims, they had no definite time in which to perform any services other than designated calls to the switching center, and usually did not consume anywhere near eight hours a day or forty hours a week in active duty. There is no dispute that they received a monthly salary. Appellants assert it was paid for their eight hour a day shift or for 40 hours for a five day week. Defendant, contending appellants did not take forty hours for their services, concedes that their salary was based upon the equivalent of forty hours of service per week. This is evidenced not only by the method which was used in calculating plaintiffs' overtime, but by the fact appellants reported and were paid overtime only for emergency services performed during the nighttime hours.

Appellants argument that they understood the bulletin A-36 as promising pay for their standby time is absurd, in view of their conduct as disclosed by this record.

As we have pointed out, at the time of the issuance of those bulletins it was not usually supposed that standby time was compensable, and it is clear that it was not being paid for by the defendant either before or after the revision of the bulletin of 1942 or 1943. Could any intelligent person have understood the bulletin as promising him compensation for standby time when at the time of his employment he was told that the job required him for five days a week to live on the Company's premises, and during those days to remain twenty-four hours a day close enough to the station house or his residence to be able to respond in case his services were needed for an emergency; that he would be paid overtime for any emergency work performed during the nighttime hours, and then, by bulletin, informed that he had no regular hours in which to perform his services but that forty hours should be considered a week's work, and he would be paid time and a half for any excess hours; that he was then instructed to show for his normal services eight hours, neither more nor less, regardless of whether he performed that amount of service, and to show as overtime only emergency services performed during the nighttime hours, and that his overtime compensation would be determined by computing his hourly rate on the basis that his monthly salary was paid for forty hours of service?

If the appellants were receiving any part of their salary as compensation for their standby time as such (which they vociferously denied in their complaints, affidavits and depositions), it is certain that, to their knowledge, the hourly rate upon which their overtime compensation was fixed was erroneously computed so as to give them grossly excessive overtime compensation. In other words, if the salary was received as compensation

not only for forty hours of active service but also for their standby time as such, then in determining their hourly rate the computation should have been made on the basis of their salary being paid either for eighty or one hundred twenty hours.

The testimony of Mr. Wert (substation operator) is in accord with all other portions of the record on the subject:

> "Q. And that your monthly rate was broken down to give you an hourly rate based on 40 hours a week. Is that correct? A. Our monthly wage was broken down to show the hourly rate that we earned in that month, yes.
>
> Q. Based upon 40 hours in the week? A. That is right.
>
> Q. It was not based upon 24 hours in a day, was it? A. It never has been.
>
> Q. It was based upon eight hours a day, five days a week, or 40 hours a week. Is that correct? A. That's correct" [Ap. 80].
>
> Wert's Dep., pp. 54-55, line 20/4.

How can appellants now claim that their standby time was compensable and that they understood it to be such, in view of the fact that they knew their overtime payments for emergency services during nighttime hours was computed on the basis *that their salary was not applicable to or paid for their standby time?*

Appellants assert that in showing eight hours per day for their normal services whether they actually consumed that amount of time or not, and in only reporting as overtime emergency services performed in the nighttime hours, they were following the instructions of the defendant. But such fact if true does not avail them. That

the appellants' acquiescence in the defendant's instruction to report only overtime for emergency services in the nighttime hours, and acceptance of overtime figured on the basis that their salary was applicable to 40 hours of service a week, constituted both an implied and express agreement that their standby time for which they are seeking recovery was not compensable. See:

Williams v. Jacksonville Terminal Co., 315 U. S. 386, 398;

Shepler v. Crucible Fuel Co. (C. C. A. 3), 140 F. 2d 371, 373-4;

Peffer v. Federal Cartridge Corp. (D.C., Minn.), 63 Fed. Supp. 291,304.

If it be conceded for the purposes of argument that such an employment arrangement would not have been a bar to recovery under the original act before its amendment (actually we believe that the factual situation could have been shown to have been such as to have rendered the arrangement valid, even under the original Act), it is clear that under Subsection (d) of Section 2 of the Portal Act, the District Court is divested of jurisdiction of the subject matter of the causes of action. Subsection (a), declaring that no activity is compensable unless made so by (1) an *express provision* of a contract, (2) custom or practice, is followed by Subsection (b) which reads:

> "(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice *only when it was engaged in during the portion of the day with respect to which it was so made compensable.*"
>
> Portal Act of 1947, Part II, Sec. 2(b).

Anderson, a substation operator, testified:

> "A. I consider as standby time, any time after my dinner hour until going to bed, although we were required to get up during the night if an alarm rang. We were still on standby when we were asleep."
>
> [Anderson's Dep., p. 34, lines 5/8; Ap. 43.]

Obviously the Subsection (b) was inserted for the express purpose of prohibiting recovery for standby time for which recovery is here sought.

We would again call attention to the debate (*ante* page 27) on the Conference Report to the house in which the Chairman of the House Committee assured Representative Hinshaw that Subsections (a) and (b) of Section 2 covered the precise situation of the instant cases and barred recovery, the Committee believing recovery for such on-call or standby time was not expected by the employees and would be windfall compensation.

While there is no question but that the record which we have thus far called to the attention of the court is entirely contrary to the claim of appellants that they understood Bulletin A-36 as promising them overtime compensation for so-called "standby time," the depositions of the appellants are so absolutely contradictory of that claim that we feel justified in calling them to the attention of the court.

Ellingford (substation operator)—

> "Q. Did you ever put down your standby time after 6:00 o'clock, I mean, on this sheet? A. No. They told me not to.
>
> Q. Who told you not to? A. Every chief clerk of every division I have worked in. *They said standby time was not allowed.*" [Dep. p. 42, lines 15/20; Ap. 54].

Wert (substation operator)—

"Q. Did you ever receive any pay for the standby time? A. *Not as such.*"

* * * * * * * *

"Q. By Mr. Sokol: What do you mean by standby time, Mr. Wert? A. *Time when you are off duty, but on call.*" [Dep. p. 42, lines 17/26; Ap. 78].

Kaneen (substation operator)—

"Q. You didn't put your standby time on that? A. No.

Q. Why not? A. There was no place to put it.

Q. What do you mean by that? A. There was no blank left on there to put it. In other words, you filled the form out in the manner requested by the Company." [Dep. p. 47, lines 19/26; Ap. 67].

Rogers (hydro station attendant)—

"Q. You only put down, then, from 7:30 a. m. to 4:30 p. m.? A. With one hour out for lunch.

Q. Why don't you put in the time after 4:30 p. m. that you are waiting for these calls? A. Well, that would be overtime, wouldn't it?

* * * * * * * *

Q. And the reason you don't put that other time down is— A. *You wouldn't get any pay for it, if you put in for waiting, overtime for waiting. You've got to show something there that you did.*" [Dep. pp. 33/34, lines 15/1; Ap. 95].

Borden (primary service man)—

"Q. But still you don't get paid for any of that standby time, except the time you actually leave your home to go out on duty? A. *That is right; just what I am called out on.*" [Dep. p. 45, lines 16/19; Ap. 19].

Honnell (primary service man)—

"Q. By Mr. Sokol: I would like to ask you this question: Why haven't you put in this so-called stand-by time on your overtime sheet? Why haven't you asked for overtime on that? A. You mean standby after 5:00 o'clock?

Q. Yes. A. *Well, I didn't think there was any use. I didn't think anybody got it.*" [Dep. pp. 24/25, lines 26/7; Ap. 29].

Smith (primary service man)—

"Q. If that was the case why didn't you put in for the time that you were waiting at home to answer those calls? A. Well, I didn't figure there was any use. Nobody else ever done it."

* * * * * * * *

"Q. *You mean that is the custom and practice in the company?* A. *That is the way they had been doing for years, at least ever since I've been there.*

Q. Not to pay for that time? A. Yes." [Dep. p. 19, lines 8/23; Ap. 32.]

Culbertson (primary service man)—

"You only put in for the actual time that you worked. Is that right? A. Yes.

Q. When you left your home and went out on an emergency? A. Yes; that is the only time.

Q. Why did you only put in for that time? A. That is what they told us to do.

Q. Who told you to do that? A. The superintendent." [Dep. p. 43, lines 17/26; Ap. 24.]

"Q. But you only got paid for the time you spent there in actual work, and didn't get paid waiting to answer that call? A. No.

Q. You did not? A. I did not get paid." [Dep. p. 48, lines 11/16; Ap. 25.]

Griffes (head works tender)—

"Q. Otherwise, the time between 4:30 p. m. and the time that the alarm rang, you don't get paid for that? * * * A. No." [Dep. pp. 35/36, lines 25/2; Ap. 114.]

Smith (primary service man)—

"Q. And so you never got any money for waiting? A. No.

Q. You never got any money for waiting around like that? A. Oh, no." [Dep. p. 23, lines 2/6; Ap. 33.]

Anderson (substation operator)—

"Q. Did you ever put down this standby time when you were waiting to do your work? A. No, I did not.

Q. Why not? A. *It wouldn't have been allowed to go through.*" [Dep. p. 33, lines 5/9; Ap. 42.]

Kaneen (substation relief operator)—

"Q. I see. However, the specific time that you got paid time and a half for was when you were actually answering emergency calls over at the station? A. Other than when we went on a six-day operation, yes." [Dep. p. 38, lines 16/19.]

Most appropriate is the famous, century-old observation of Lord Chief Justice Sugden, which has been universally followed by the State and Federal Courts of this country:

> ". . . tell me what you have done under such a deed, and I will tell you what that deed means."
>
> *Attorney-General v. Drummond,* 1 Dru. & Warren 353, 368; 2 H. L. Cas. 837.

As announced in the *Skidmore* decision:

> "The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."
>
> *Skidmore v. Swift & Co., supra,* 323 U. S. 134, 137.

As bearing on the interpretation which the employees of the defendant placed upon the bulletin and their contracts of employment, it is interesting to note that while the record discloses without dispute that the A. F. of L. Union, representing certain of defendant's employees, had expended great effort through advertising, and otherwise, to induce all of the employees of the classes involved in this suit to join the suit, less than one-fifth have done so [R. 184-186]. Of course, the failure of the other employees to join in the suit is not a ground for denying the appellants relief if they are entitled to it. But, we feel that the failure of more than eighty per cent of the resident employees to join in suits, or otherwise advance any claim for overtime compensation beyond that which has been paid them for emergency services is additional evidence of the fact that none of the resident employees interpreted either their contracts of employment or the bulletin, or both together, as entitling them to any overtime compensation for their so-called standby time.

There Is No Theory Upon Which Recovery Can Be Allowed Plaintiffs in the Instant Cases Without Rendering the Portal Act Nugatory.

It is difficult to understand how the defendant can be held liable in the instant cases and any other employer not also liable for preliminary or postliminary activities to the same extent that he would have been under the interpretations given to the original Act. Wherever in any employment the employees are required to be upon the premises for any time before or after their active work or are required to perform any preliminary or postliminary activities, such time or services of the employees must necessarily have been taken into consideration by both parties in fixing the hourly rate of their pay or their weekly or monthly salary. In such cases, the hourly rate or their salary would necessarily have been less had the employer, instead of requiring the preliminary or postliminary services, hired other employees to perform them. Hence, in a situation such as we have assumed, *the employees and the employer must have agreed that the hourly compensation or weekly or monthly salary was sufficient remuneration for all the activities of the employees, and that their preliminary or postliminary time was not compensable as such.*

The assumed situation was prevalent in almost all places of employment throughout the nation and resulted in the flood of suits for overtime compensation which cascaded upon the courts in increasing volume with the expanding judicial interpretation of the Fair Labor Standards Act.

It is most significant that Congress did not permit recovery for activities which were made compensable by *a contract*. Congress undoubtedly realized that the word "contract" unqualified would embrace an implied contract

and might be held to apply to a theoretical or assumed contractual obligation. Congress was cognizant of the fact that the judicial interpretation of the Fair Labor Standards Act by following along lines, which, though logical, were wholly divorced from the realities of industrial life, had so extended the Act as to make compensable a multitude of activities that neither industry or labor had contemplated should be directly paid for, bringing industry to the verge of bankruptcy.

By the term *"express provision"* of a contract, it is clear that Congress intended that there should be no basis for any claim of either an implied or indirect agreement; that only such activities should be compensable where in any contract, oral or written, there was an *"express provision"* that the particular activity should be compensable, or made compensable by custom or practice.

Most appropriate is the language of the Massachusetts District Court in dismissing after the effective date of the Portal Act a suit, for overtime compensation:

> ". . . It is therefore quite essential that jurisdiction should be clearly established before proceeding with such a vast task. *It cannot be established by tortous reasoning as to the construction of a contract.* The statute calls for *a clear and express provision of a contract* making the time for which compensation is sought compensable in fact and in law."
>
> *Finn, et al. v. Bethlehem Steel Company* (D. C. Mass.), 15 Labor Cases, Para. 64, 592, p. 73, 847. See Appendix pages 129-137 where many cases to same effect are digested.

It is certain in the instant cases that there was no express promise or contract to pay for any standby time. With equal clarity, it is established that the custom and

practice was *not* to pay for standby time, but only for emergency services performed during nighttime hours. As we have before pointed out, the overtime paid for those emergency services would have been grossly excessive if the employees had considered (as they vehemently insist they did not) that they were receiving compensation for their inactive on-call or standby time.

Hence, we submit that there is no theory upon which the defendant can be held liable for the sixteen or any hours of on-call or standby time for which plaintiffs here seek recovery that would not equally render every employer liable for any preliminary or postliminary activities to the same extent that such liability would have existed before the Portal Act.

Defendant's Application to the War Labor Board.

The appellants apparently place great reliance on the application which the defendant made in 1945 to the War Labor Board, setting out a portion of the application (B. 35) wherein appellants advised the Board that the defendant desired to change its method of operation of its sub and hydro stations by relieving the operators of the necessity of remaining on duty for twenty-four hours a day, but desired to continue the same salary payments to them. The appellants argue that the application was an admission that the appellants' standby time was compensable. There are a number of answers.

The application was made after the *Glenn* suit was filed, but prior to the filing of the *Drake* suit [D. R. 6]. An examination of the defendant's answer to the second amended complaint in the *Glenn* case [R. 17-36] will show that the defendant, prior to the Portal Act, denied the right of the plaintiffs to recover for standby time.

The reason for the application was that if, contrary to the defendant's expectations, the plaintiffs should recover in the *Glenn* suit, the defendant not only would be obligated to pay an enormous amount for overtime and liquidated damages but would also be obligated for enormous future costs—costs which would be out of proportion to the salaries paid much more skilled employees, and that would render the defendant's continuance of its then system of operation impracticable. Hence, the defendant, at very great expense, installed automatic machinery so as to be able to dispense with the requirement that resident employees remain on its premises after their last call in the evening to the switching center.

There is no question but what the conditions of service of the resident employees would be changed by the proposed method of operation without any change in compensation, except that they might not be called on as frequently for emergency services during the nighttime hours. As we have heretofore pointed out, throughout the industry a large majority of employees were required to be upon the employer's premises some time before and after work to perform preliminary and postliminary activities, and that it had generally been assumed that their pay either by hourly rate or by a weekly or monthly salary for their direct services was sufficient so there was no pay for their preliminary or postliminary activities. The Portal Act was passed for the express purpose of relieving employers for liability for such activities.

In addition to the foregoing considerations, the application to the War Labor Board could not be considered as an admission of any character. The wage stabilization statutes in force at the time of the application prescribed very drastic penalties upon any employer who made any

change in his methods of operation which involved a possible reduction of duties without a commensurate reduction of wages or salaries, unless the permission of the War Labor Board was obtained.

While the defendant has always taken the position that the plaintiffs in the *Glenn* case were not entitled to recover for their standby time, plaintiffs were insisting that under the judicial interpretation of the Act they could recover.

No one, of course, can foretell the result of any present or future litigation. The problem which defendant was faced with by the proposed change in the method of operation would not have been solved by its own determination or conclusion that it was not making an increase in compensation. Its problem was, whether at sometime in the future it should be claimed by any governmental agency that by changing its method of operation without obtaining permission of the Board it had violated the stabilization laws. If such claim should be made and sustained, the defendant would have been faced with staggering penalties. Ordinary prudence would dictate to any sane man that as a matter of precaution, the approval of the War Labor Board should be obtained of its proposed change in method of operation.

Finally, it should be pointed out that recovery can not be based upon any admissions of the defendant, or even statements of the direct or indirect compensability of the time, the Portal Act specifically providing that there can be no recovery for activities unless there were either (1) an express *provision* of a *contract* to pay for such activities or (2) *a custom or practice at the particular plant to pay for such activities.* It is certain that the applica-

tion to the War Labor Board in no sense constituted or could constitute a contract, express or implied, that stand-by time was compensable; neither could it constitute or evidence any practice or custom to that effect.

(3) The Record Showing That the Court Was Without Jurisdiction of the Subject-Matter of the Action, the District Court Had No Other Course Than to Enter a Decree of Dismissal.

As noted, the appellants cite *Kennedy v. Silas Mason Co.*, 334 U. S. 249, and *Twigg v. Yale & Towne Mfg. Co.*, 7 F. R. D. 488, as sustaining the proposition that generally summary judgment should not be granted under the Fair Labor Standards Act, quoting from the first case:

> ". . . No conclusion in such a case should prudently be rested on an indefinite factual foundation."
> *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 256.

There are two answers. First, summary judgment was not given, but the court, of its own motion, dismissed the suits for want of jurisdiction.* Second, the factual situation here is not indefinite and, as we have shown, there is no conflict on any matters that are at all material to the issue of jurisdiction. The instant cases are not at all factually similar to *Kennedy v. Silas Mason Co., supra,*

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*In the District Court it was suggested, both in the oral argument and in the defendant's closing brief, that the court was probably without jurisdiction of the subject-matter.

where portions of the record on which the District Court acted were not before the Supreme Court. Further, there was no contention in that case that it was affected by the Portal Act; nor was there any question of the jurisdiction of the subject-matter of the action by either court.

In this connection it may be well to note the suggestion of the appellants (B. 17) that the complexity of the case may be illustrated by the fact that the trial court entered its judgment before it discovered that certain depositions taken in the case had not been filed.

The actual facts were that, through the inadvertence of the notary taking them, four depositions had not been filed before the hearing on the motions. The defendant in its points and authorities and its oral argument had referred to and quoted from all of the depositions that had been taken, including the four that had not been filed. As its references and quotations were not challenged by the plaintiff, the court naturally acted upon them without going to the Clerk's office to find out if the originals were actually on file. As a matter of fact, both parties assumed that all the depositions that had been taken had been filed, and it was not until the Clerk was preparing the record that it was discovered that four were missing. The parties stipulated that they should be filed *nunc pro tunc* as of the 5th and 8th of October, 1945.

> ". . . and that for all purposes, it shall be deemed and treated as though the said depositions had been on file at all times respectively since the 5th and 8th day of October, 1945, . . ." [R. 355.]

This stipulation was approved by the Court [R. 356]. Furthermore, it is to be noted that the four depositions could be eliminated from the record without the result being changed. Appellants do not point to any testimony in any of them to which we have called the court's attention that was not cumulative of like testimony in other depositions that had been filed.

Clearly the inadvertent omission of filing the depositions does not tend to show (1) any conflict in the facts, (2) that the facts are complex, or (3) that either the District Court or this Court should encounter any difficulty in applying the applicable law to the facts which are disclosed without dispute by the record.

In *Tweed v. Yale & Towne Mfg. Co.*, 7 F. R. D. 488, cited by appellants (B. 15/16), the court found that the facts as to the plaintiff's right to recover were in dispute and hence, of course, could not grant a summary judgment. In this case we have demonstrated, we believe, that insofar as any fact that is material to the question of the jurisdiction of the court, there is absolutely no controversy in the record.

It appearing without controversy that the plaintiffs seek recovery for their so-called "stand-by time," and it further appearing without controversy that such stand-by time was not made compensable by an *express or any provision* of a contract or by practice or custom, the District Court under the express provisions of subsection (d) of Section 2 of the Portal Act was without jurisdiction of the subject matter of the suit.

It may be conceded that it is somewhat unusual for a statute to make jurisdiction of a cause of action dependent upon the right of the plaintiff to recover, but the purpose of Congress in so providing is perfectly apparent.

When Congress took up the study of the problems which were confronting the nation by the flood of suits for overtime compensation, it found the situation contained two grave dangers: (1) the bankruptcy of industry; (2) the almost incalculable amount of time of the courts that would be consumed by the trial of the pending suits. Congress undoubtedly realized that merely prohibiting recovery for activities which were not compensable by an express contract or custom or practice would only partially solve the problem. It knew, of course, that summary judgment could not be entered if there was any conflict in the record. Congress must have realized that any lawyer of ingenuity could, by carefully worded affidavits, pleadings and answers to interrogatories, raise an apparent conflict on the face of almost any record sufficient to defeat summary judgment. It knew that the pending suits which had been filed for billions of dollars would not be easily surrendered or abandoned by counsel who had instituted them.

It was the obvious purpose and intent of Congress by withdrawing jurisdiction of suits for non-compensable activities to enable the courts to summarily dispose of such actions and avoid the enormous amount of time that would be taken in their trials, as well as to relieve the parties of

the almost unbearable expense that such trials would entail.

We submit that where it is clear from the record, as it is in the instant cases, that the plaintiffs cannot prove an applicable contract, custom or practice, it is not only the duty of the court to dismiss the action but it is to the benefit of both parties for the court to do so, rather than subjecting them to the great expense of prolonged litigation. Even in cases of summary judgment which do not involve the question of the court's jurisdiction (which, of course, must always affirmatively appear on the face of the record to enable a federal court to proceed), the decisions hold that facts should not be assumed to exist which are not disclosed by the record, and that plaintiffs must be presumed to have presented their best case in its strongest light [See cases collated at Ap. p. 150 to p. 152].

When in the instant cases the District Court on considering the motions of both parties for summary judgment ascertained that it appeared from the record that it was without jurisdiction of the causes, it had no other alternative but to dismiss them on its own motion for want of jurisdiction.

> "And if the record discloses that the lower court was without jurisdiction, this court will notice the defect, *although the parties make no contention concerning it.*"
>
> *United States of America v. Corrick,* 298 U. S. 435, 440, 80 L. Ed. 1263, 1268.

In affirming the orders of the District Court entered after the effective date of the Portal Act and dismissing two suits filed prior to the Portal Act, the Court of Appeals for the Second Circuit said:

> "We cannot yield to plaintiffs' contention that the court's action on the motion to dismiss was premature. If it appeared to the satisfaction of the court *at any time* after the suits were brought that they did not really and substantially involve a dispute or controversy properly within its jurisdiction, it was its duty to proceed no further and to dismiss the suit."
>
> *Fisch v. General Motors Corporation;*
>
> *Bateman v. Ford Motor Co.* (C. C. A. 6th, 1948), 169 F. 2d 266, 269; cert. den. 335 U. S. 902, 93 L. Ed. (Adv.) 247.

See also Appendix, pages 124 to 125, where many additional authorities to the same effect are collated.

(4) The Portal-to-Portal Act Is Constitutional.

Plaintiffs, under Point VIII (B. 50-52), challenge the constitutionality of the Portal Act. In view, however, of their statement that, because of the decision of this Court contrary to their contention in *Potter v. Kaiser Company, Inc.*, 171 F. 2d 705, they make the point only to preserve it in case the Supreme Court holds the Portal Act unconstitutional. We think no argument on the matter is necessary, but we have, however, collated on pages 121 to 123 of the Appendix numerous decisions of the appellate court directly sustaining its constitutionality.

II.

The Defendant's Affirmative Defense of Good Faith Reliance Upon Administrative Regulations, Rulings, Approval and Interpretation of Agencies of the United States Is Established by the Record as a Matter of Law.

The defendant, in its third and fourth affirmative defense [R. 155-156], pleaded its good faith in declining to pay overtime compensation for standby time, in that it relied upon administrative regulations, orders, rulings, approvals and interpretations of administrative agencies of the Government of the United States.

The questions as to whether the record shows that such plea was established under Section 9 of the Portal Act so as to be a complete defense, or under Section 11 of the Act so as to give the court discretion to disallow liquidated damages, were not germane to the issue of jurisdiction and were not passed on by the District Court. If this court agrees with the action of the court below it will, of course, be unnecessary to consider these affirmative defenses.

However, we are confident that if the court below had jurisdiction of the subject-matter of the suits, it must be held that the affirmative defenses were established as a matter of law by the record.

Section 9 of the Portal-to-Portal Act is printed in full in the appellants' brief (page 39). It clearly provides that where an employer would otherwise be liable under the statute, it, nevertheless, shall be a complete defense to allege and prove that he acted in good faith "in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency

of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. * * *"

The specific governmental acts and regulations on which defendant relied are set out in the record [pp. 158-166].

The first regulation relied on is Interpretative Bulletin No. 13 issued in July, 1939, revised in other respects in October of that year and again in October of 1940 [R. 158-160], with reference to employees engaged to perform specific tasks who were required to remain upon the defendant's property subject to call [R. 158-160].

The next ruling and interpretation of an agency of the United States is set out in the defendant's answer [R. 161-165], wherein it is alleged that the Pacific Gas and Electric Company (hereinafter referred to as "P. G. & E.") operated an electrical distributing system in substantially the same manner as the defendant and that the terms and conditions of the employment of resident P. G. & E. employees were substantially the same as those of defendant's employees of that class [R. 160-161]; that the union representing the P. G. & E. employees, demanded increased pay for nearly all of its employees including premium pay for its resident employees. The Board referred the controversy to a panel which reported:

> "3. Resident Employees
>
> "The panel unanimously recommends that no change be directed in the matter of the wages of resident employees.
>
> "We were impressed with the fact that they are now receiving 40 hours pay for 30 hours work and time and one half for overtime; that they are their own timekeepers and that they have considerable free time for their own pursuits.

"We recognize that they are more or less limited in their coming and going and that in certain surroundings such limitations can be very irksome.

"But balancing the values and the disvalues of the present arrangement we do not believe that undue hardships are involved." [R. 163-164.]

The Board unanimously adopted that portion of the Panel's recommendation [R. 164].

The facts with reference to the application to the War Labor Board and its rulings as alleged are admitted by the appellants [R. 287, 325]. The affidavit of Mr. R. G. Kenyon, the head of defendant's Personnel Department [R. 208-211], and of Mr. Mullendore, the president [R. 214-215], set forth that the terms and conditions of employment of the P. G. & E. resident employees and those of the defendant were substantially the same, and that the defendant at all times relied upon the ruling of the War Labor Board [R. 210-211, 215]. The facts stated in those affidavits are not contradicted.

Lastly, it appears from the affidavit of Mr. Mullendore [R. 212-213] and also from the affidavit of Mr. Stellern [R. 247-248] that Mr. Stellern was the manager of the Wage and Hour Division for Southern California and Deputy Administrator of the Act for Southern California and Arizona from some time in the month of May, 1940, to November, 1946 [R. 246], that the payroll records of the defendant had been inspected several times by his inspectors who had reported that in their judgment the Company was in full compliance with the Act [R. 247], that at the suggestion of Mr. Chambers, who was the public relations man for the Administrator of the Act, he, Stellern, had arranged a radio interview to inform employers

and employees alike of the provisions of the Act [R. 248], that Mr. Stellern had selected Mr. Mullendore to ask the questions which he, Stellern, would answer, because Mullendore at that time was president of the State Chamber of Commerce [R. 248]. The script used by both Mr. Mullendore and Mr. Stellern was prepared by Mr. Chambers from information Stellern had given Chambers [R. pp. 248-249]. In that script Mr. Stellern volunteered to Mr. Mullendore the following:

> "* * * *I am happy to be able to tell you that your company was one of those whose records were inspected in this current program, and we found that you are operating in complete compliance with the Act.*" [R. 213.]

Mr. Mullendore further states that the Company's reliance on the administrative bulletin and upon the rulings of the War Labor Board were strengthened by the fact that all their records were inspected by the government and no complaint had been made [R. 215].

As we read appellants' brief, their main argument seems to be (1) that the defendant could not have relied on Interpretative Bulletin 13 after the decision in the *Armour* and *Skidmore* cases; (2) that the radio script between Stellern and Mullendore was not an administrative regulation, approval, or interpretation of any agency; (3) that the defendant had no right to rely on the War Labor Board's ruling because the Board was not concerned with enforcing the Fair Labor Standards Act, and because of the application of defendant to the War Labor Board to approve its proposed changed method of operation.

(1) The Defendant Was Fully Justified in Relying at All Times Upon Interpretative Bulletin 13.

Assuming for purposes of argument without in any way so conceding—that the decisions referred to cast a doubt as to the accuracy of the bulletin as to defendant's resident employees (a subject hereafter to be discussed), it is to be noted that paragraph 8 [R. 160] was in no wise involved in the decisions in the *Armour* and *Skidmore* cases. Paragraph 8 fits the situation as to the primary service men like a glove. It is quite apparent that the bulletin constitutes an absolute and complete defense under Section 9 as to the primary service men. As heretofore noticed, the appellants discuss only the right of recovery of the resident employees, and do not mention the primary service men or the effect of paragraph 8 of the bulletin as to them.

Paragraphs 6 and 7 of the bulletin [R. 158-9] clearly justified the defendant in assuming that its resident employees were not entitled to overtime compensation except for their emergency services, and this is impliedly conceded by the appellants. They argue, however, that the *Armour* and *Skidmore* decisions showed that the bulletin was erroneous, and that the defendant, after those decisions, had no right to rely upon it. This contention is unsound. An examination of the decisions cited will show that neither of them questioned the bulletin. They simply held that its examples were not applicable to the factual situation then being considered by the court. If it were necessary, we believe we could demonstrate that even on the present rec-

ord, accepting every contention of the appellants, it must be held as a matter of law that the factual situation of the instant cases was so dissimilar from the *Armour* and *Skidmore* cases that the defendant had a right after those decisions to rely upon the interpretative bulletin, even if such right were tested by the bulletin without regard to the acts of other governmental agencies hereafter discussed.

But if, for the purpose of argument, it be assumed that as to its resident employees the right of the defendant to rely on the bulletin after the *Armour* and *Skidmore* decisions is a question of fact which could not be decided on summary judgment, it is nevertheless obvious that since the defendant had a right to rely on it up to the time of those decisions, such right, under Section 9 of the Portal Act, would be a complete bar to a recovery by appellants for any activities prior to those decisions.

Appellants will undoubtedly reply that, assuming the right of the defendant to rely on the bulletin prior to the *Armour* and *Skidmore* decisions, if it had no right thereafter, the continuation of its method of compensation without change shows that its previous act was not in reliance on the bulletin.

There are two answers to such argument, if advanced: (1) The difference between the factual situation of the instant cases and the decisions referred to; (2) the interpretation given to the factual situation of the instant cases by the Administrator through his agent hereafter discussed.

(2) Defendant Was Entitled to Rely Upon the Interpretations and Statements of Mr. Stellern, in Charge of the Southern California Office of the Department of Labor, and Deputy for the Administrator of the Act for Southern California.

Appellants cite several cases of which *Burke v. Mesta Mach. Co.* (D. C., Pa. 1948), 79 Fed. Supp. 588, 612, is typical, to the effect that defendants cannot rely upon inspectors of the Labor Department. In several of the cases cited, the advice of these inspectors was contrary to the express rulings of the Administrator. Thus, in the *Burke* case, it is said:

> ". . . Even so, such advice by an inspector, who would be considered in the lowest echelons of the Department of Labor, was inconsistent with the uniform and well-publicized interpretations and ruling made by the Administrator himself and by those responsible officials to whom he had delegated the exacting task of interpretation."
>
> *Burke v. Mesta Mach. Co.* (D. C., Pa.), 79 Fed. Supp. 588, 612.

However, Mr. Stellern was not an inspector. He was the deputy in Southern California for the Administrator. His actions were the actions of the department of which he was the head for Southern California.

In *Moss v. Hawaiian Dredging Co.* (D. C. N. D. Cal., Mar. 30, 1949), No. 25299-G, Bureau of National Affairs Daily Labor Report No. 66, Apl. 6, 1949, p. F-1, 16 Labor Cases, par. 65,066, the District Court for the Northern District of California held that it was a defense under Section 9 to show that the employer relied in good

faith upon the letter of the Regional Attorney for the Wage and Hour Division.

In *Darr v. Mutual Life Insurance Co.* (C. C. A. 2), 169 F. 2d 262, 265-6 (certiorari denied 335 U. S. 871), the Second Circuit Court of Appeals held it was a complete defense under Section 9 to show that the defendant relied in good faith on the administrative practice of the Wage and Hour Division *not to enforce the Fair Labor Standards Act against the insurance industry.*

In *Kenney v. Wigton-Abbott Corp.* (D. C. N. J., 1948), 80 Fed. Supp. 489, the court held that it was a good defense under Section 9 to show that the employer relied in good faith upon a circular letter of the Bureau of Yards and Docks of the Navy.

(3) Defendant Was Clearly Entitled to Rely Upon the Ruling of the War Labor Board in the Pacific Gas and Electric Case.

While the appellants attack the right of the defendant to rely upon Bulletin 13 and the acts of Mr. Stellern as above set out, they devote little time to the ruling of the War Labor Board. That, of course, was clearly a governmental agency within the meaning of Section 9, and it has been so held. See:

Rogers Cartage Co. v. Reynolds (C. C. A. 6) (1948), 166 F. 2d 317.

Appellants argue that the Board was not concerned with whether the P. G. and E. was violating the Fair Labor Standards Act or not, but only with war problems. This contention, we believe, is untenable. No regulation of the government with reference to preventing increases in wages was supposed to modify in any way the

provisions of the Fair Labor Standards Act, and the War Labor Board in discharging the functions which had been delegated to it certainly could not authorize the violation of the Act, in fact, it was its duty to see that it was complied with. No lawyer or layman can read the claims of the union and of the company on the one hand and the recommendation of the panel which was unanimously approved and reach any other conclusion than that the Board considered the method of paying the resident employees was not only sufficient *but in entire compliance with federal laws.* If, in fact, it believed that defendant was not in compliance it would at least have been its duty to have called that to the attention of the parties. *Indeed, it is difficult to conceive of the War Labor Board acting as a stabilization board and having a claim presented to it for increase in compensation of resident employees and denying it if under the Wage and Hour Act they were entitled to that or greater compensation.*

It is true that the rulings were with reference to a different company, but the record is uncontroverted that the conditions were precisely the same.

Section 9 of the Portal Act makes it a complete defense, even where an employer would otherwise be liable for overtime compensation and penalties notwithstanding the provisions of Sections 2 and 4 of the Act, to plead and prove that in good faith he relied on "an administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, *or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged.*" It is difficult to understand how there could be a clearer case of enforcement policy with respect to the class of employers to which defendant belongs than the ruling of

the War Labor Board as applied to defendant's method of compensating its resident employees.

Appellants' argument that the defendant's lack of good faith in its reliance on the rulings of the War Labor Board is shown by its application to that Board in November of 1945, in which it sought the approval of the Board of the change which it contemplated making in the method of operating its sub and hydro stations, has been fully answered *ante,* pp. 47 to 49.

(4) The Over-all Picture of the Administrative Regulations, Orders and Rulings Relied on.

Thus far, we have been considering separately the various acts of the governmental agencies relied upon. When they are considered together, the composite picture shows that the defendant was more than justified in assuming that its method of compensating its resident employees was in compliance with the statute.

Thus, we find from the record that in October, 1940, the Administrator of the Act issued his Interpretative Bulletin 13, paragraphs 6 and 7 of which clearly advised that the resident employees were not entitled to standby time, and paragraph 8 that the primary servicemen were not entitled to overtime for being on call. On July 5, 1941, the Administrator of the Act, through his deputy for Southern California, publicly advised the defendant that the defendant's records had been inspected and it was found to be operating "in complete compliance with the Act." In 1943 as the result of a complaint which the Department of Labor received that the resident employees were not receiving proper overtime, the defendant was again inspected and the Department reached the conclusion that defendant's method of computing compensation

did not violate the Act [R. 249]. The defendant knew of such inspection and the conclusions reached by the Department and naturally assumed that that decision was correct [R. 215].

Following the unsolicited public announcement of the Deputy Administrator of the Act for California that the Department of Labor had inspected defendant and found it to be operating in strict compliance with the Act, premium pay for resident employees of Pacific Gas & Electric Company was demanded, and on July 8, 1943, the War Labor Board panel unanimously recommended against granting any increase, holding that the overtime compensation for emergency services was all they were entitled to [R. 162-165], and in October, 1942, the War Labor Board denied the application of the Pacific Gas & Electric resident employees [R. 164].

While it is true that the Supreme Court in the *Armour* and *Skidmore* cases had held that the factual situation there considered did not come within the examples in Interpretative Bulletin 13 and the plaintiffs there were entitled to recover for standby time, it is equally true that the Department of Labor and the Administrator of the Act, to the knowledge of the defendant, were fully cognizant of the *Armour* and *Skidmore* decisions and both were familiar, as defendant knew, with its method of compensating its resident employees. Notwithstanding the decision in the *Armour* and *Skidmore* cases, no attempt was made by the Administrator to require any change in defendant's method of compensating its employees.

Can there be any question but that the combined ruling of the War Labor Board plus the failure of the Administrator of the Act after the *Armour* and *Skidmore* decisions

were rendered to inform the defendant that his previous advice to the defendant that it was operating "in full compliance with the law," was erroneous or to take any steps to require the defendant to change its method of operation, *constituted within the meaning of Section 9 an "administrative . . . approval or interpretation" of an agency of the United States or an administrative practice or enforcement policy of such agency with respect to the class of employers to which defendant belonged?*

If the record in the instant cases do not constitute a defense under Section 9 of the Portal Act, it is difficult to contemplate what would.

As we have seen in *Darr v. Mutual Life Insurance Company* (C. C. A. 2), 169 F. 2d 262, 265 (certiorari denied 335 U. S. 871), the Circuit Court of Appeals held that it was a complete defense to an insurance company sued for non-payment of overtime that it had not made such payments in reliance upon the policy of the Department of Labor not to enforce the Act against insurance companies. Unless that decision is to be disregarded, it seems to us certain that it must be held that the defendant had a right at all times to rely upon Interpretative Bulletin 13 and the rulings of the War Labor Board.

We submit that under the rule announced in *Darr v. Mutual Life Insurance Company, supra,* 169 F. 2d 262, 265, as well as in reason, the failure of the Department of Labor, under the circumstances outlined, to take any steps after the *Armour* and *Skidmore* cases to cause the defendant to change its methods of compensating its employees, was in every sense an approval of defendant's method of compensating its employees by a governmental agency—in fact, by the very agency created by Congress

to administer the Act. To hold that the defendant could not rely on it is to denude Section 9 of any practical force or effect.

Considering that by Sections 2 and 4 Congress had prohibited recovery for both past and future activities which were not compensable by the express provisions of a contract, custom or practice, Congress must have intended to protect employers where the employer had relied upon a ruling, regulation, interpretation or approval of a responsible governmental agency from further liability even where otherwise under the provisions of Sections 2 and 4, there would be a liability. It undoubtedly seemed to Congress that it would be unjust to allow various agencies to interpret the Act so as to lead an employer to believe that certain activities were not compensable and then have the employer subjected to liability because he relied on the acts of the government through those agencies.

We submit that to hold that if the District Court had jurisdiction, the defendant has not established a complete defense under Section 9 of the Portal Act, would be entirely against the clear wording, and even more so against the spirit, of the Portal Act.

If, contrary to our expectations, this Court should hold that the decision of the court below as to its jurisdiction was in error, then we believe it must nevertheless conclude that the dismissal of the action was correct for the reason that the defense of good faith under Section 9 has been clearly and incontrovertibly established.

Conclusion.

The primary servicemen were employed for a definite eight hour shift for which they were paid a monthly salary. Defendant claims, and some of the primary servicemen admit, that between shifts they were free to go where they pleased and do what they pleased, but in the event they did not return to their homes, or, returning, left their homes, they were required to advise the defendant of a telephone number where they could be reached in the event their services were needed in case of an emergency. Some of them claim they were required to remain at their homes during certain nights of the week in order to answer telephone calls. All concede that they were not paid anything either for being required to leave their telephone numbers or for remaining in their homes, if such requirement was imposed upon them, and that the only overtime which they ever reported or for which they received compensation was for emergency services performed between their shifts.

The resident employees were employed for certain definite services to be performed between the time their first call to the switching center in the morning, and the last call in the afternoon. They were paid an agreed monthly salary and no other compensation except time and half their hourly rate for any emergency services performed during the nighttime hours, their hourly rate being computed on the basis that their salary was applicable to forty hours of work per week. The only dispute between the parties is whether, as appellants claim, between the time of their first and last telephone calls they had a definite eight hour shift during which they were required to be on duty in or about their stations or, as the defendant claims, whether they had no specified time within

which to perform any of their active services other than the time for their first and last call to the switching center and certain other intervening calls, and that their active duties did not consume more than an hour or two a day. This factual dispute is immaterial to the question of jurisdiction. Neither contention affects the conceded fact that their salary was based on forty hours per week, that there was no contract, custom or practice to pay for their on call or standby time, and that the only overtime which they reported or for which they received or expected to receive compensation was for emergency services during the nighttime hours. Appellants admit that they have been paid for all overtime that they reported.

The suit is to recover for sixteen hours of standby time. It is clear that the Portal Act was passed for the explicit purpose of prohibiting recovery for such services unless made compensable by an *"express" provision* of a written or oral contract or *by custom or practice.* The record not only fails to disclose such a contract or agreement, but establishes that the understanding was precisely to the contrary.

For the explicit purpose of enabling the courts to summarily dispose of suits based upon activities that were compensable under the judicial interpretation given the original Act, but made non-compensable by the Portal Act, Subsection (d) of Section 2 withdrew from the courts jurisdiction of such suits.

We submit that the court below had no other alternative than to dismiss the actions for lack of jurisdiction.

We respectfully, but confidently, submit that its judgment of dismissal must be affirmed both because (1) its conclusion as to its lack of jurisdiction was correct, and (2) the affirmative defenses of defendant's good faith reliance were established as a matter of law.

All of which is respectfully submitted.

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